



## OFFICE OF INJURED EMPLOYEE COUNSEL

NORMAN DARWIN, PUBLIC COUNSEL

May 2, 2010

Ken Levine, Interim Director  
Sunset Advisory Commission  
P. O. Box 13066  
Austin, Texas 78711-3066

Re: Agency Response to the Sunset Advisory Commission Staff Report

Dear Mr. Levine,

The Office of Injured Employee Counsel (OIEC) enjoyed working with your staff and appreciates the recommendations made in the Sunset Advisory Commission Staff Report regarding changes in statute and actions OIEC should take in response to issues identified in the report. OIEC believes the recommendations are thoughtful and will enhance the effectiveness and efficiency of the agency upon implementation.

Published Sunset Advisory Commission Staff Report recommendations are found below with OIEC's responses as requested in your April 22, 2010 letter:

### **Issue 1: Texas Has a Continuing Need for the Office of Injured Employee Counsel.**

#### **Change in Statute**

##### **1.1 *Continue the Office of Injured Employee Counsel for 12 years.***

This recommendation would continue the Office of Injured Employee Counsel as an independent agency, responsible for aiding injured employees in the workers' compensation system.

***Agency Response:*** OIEC agrees with the Sunset Advisory Commission Staff recommendation to continue the agency as an independent enterprise and its functions.

OIEC agrees with the staff's findings that Texas has a continued interest in providing assistance to injured employees trying to navigate the workers' compensation system and that OIEC is and should continue to be the sole entity that assists, educates, and advocates on behalf of the injured employees of Texas.

##### **1.2 *Apply standard Sunset across-the-board requirements to the Office of Injured Employee Counsel.***

This recommendation would require the Office to maintain a system to promptly and efficiently act on complaints filed with the Office. The language would require the Office to maintain information on the parties to a complaint, the subject matter, a summary of results, and the disposition. The recommendation also would require the Office to make information about its complaint procedures public and periodically notify the complaint parties of the status of the complaint.

The recommendation would also ensure that the Office develops and implements a policy to encourage alternative procedures for rulemaking and dispute resolution, conforming to the extent possible to model guidelines by the State Office of Administrative Hearings. The agency would also coordinate



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implementation of the policy, provide training as needed, and collect data concerning the effectiveness of these procedures. Because the recommendation only requires the agency to develop a policy for this alternative approach to solving problems, it would not require additional staffing or other expense. This requirement for alternative dispute resolution would not affect the way the Office participates in DWC's administrative dispute resolution process. In addition, the required policy would not affect dispute resolution that falls under TDI's authority through the Office's administrative attachment to that agency.

**Agency Response:** OIEC agrees with this recommendation. OIEC management would like to note that the agency takes internal and external complaints seriously. It is a top priority of agency management to ensure complaints are handled promptly and properly, which is exhibited by the two internal audits conducted in the area of complaint handling at the direction of agency management. OIEC management has taken the steps to ensure that the agency is already in compliance with the Sunset Advisory Commission Staff across-the-board recommendation regarding complaints.

OIEC management has formed a committee that is currently developing alternative procedures for rulemaking and dispute resolution, which will conform to the State Office of Administrative Hearings model guidelines. OIEC would like to thank Sunset Advisory Commission Staff for recommending this helpful business process improvement.

### Management Action

#### **1.3 *Direct the Office to work with DWC to ensure injured employees are fully prepared by Ombudsmen before attending a DWC Benefit Review Conference.***

This recommendation would direct the Office to take steps toward reducing the number of rescheduled proceedings at DWC, through efforts by Ombudsmen to fully prepare injured employees they are assisting. These efforts could include refraining from scheduling proceedings until after an Ombudsman has initially met with an injured employee, scheduling the Ombudsman's initial meeting with an injured employee within a certain timeframe before a proceeding, or ensuring certain important documents are possessed by the injured employee before attending a proceeding. This recommendation would work in concert with recommendation 1.1 of the DWC staff recommendations, which would require all parties to communicate preparedness before attending a BRC.

**Agency Response:** OIEC agrees with this recommendation and has taken numerous steps to ensure injured employees are fully prepared prior to entering the Texas Department of Insurance, Division of Workers' Compensation (DWC) administrative dispute resolution process. OIEC procedures have been changed to fully implement the agency's early intervention efforts. The primary objective of OIEC's early intervention efforts is to ensure that injured employees are prepared to proceed and have obtained necessary information to permit them to make the strongest case possible to establish their entitlement to indemnity and medical benefits. The fruits of these efforts will be reflected in dispute resolution data which will be available at the end of fiscal year 2010.

OIEC notes it is difficult to discourage its customers from entering the dispute resolution process if they are not fully prepared, particularly when those customers are without an income source. However, OIEC also understands the paramount need to ensure State resources are used efficiently and effectively.



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### **Issue 2: The Office Has Inappropriate Access to Claims Information Held by the Division of Workers' Compensation.**

#### **Change in Statute**

#### **2.1 *Limit the Office's authority to access claim files for injured employees the Office is not directly assisting.***

This recommendation would remove existing language that excepts the Office from the confidentiality requirements surrounding claim file information and that directs DWC to release such information to the Office. The recommendation would also remove language granting the Office broad access to information from all executive agencies. Instead, the recommendation would clarify that the Office has the same access to information that another, similarly situated party has and is allowed access to a claim file when officially assisting an injured employee.

Until the implementation of DWC's new computer system occurs, the changes made by the recommendation would require the Office to self-enforce the legal limits on its authority to access information. The Office would be required to work with DWC to implement new procedures by which the Office will request information from DWC. These procedures should reflect the practical needs of the Office's day-to-day use of the DWC computer system, yet strive to reflect the manner in which other system participants request and access information. The recommendation is not intended to require the Office to use the Public Information Act to request information from DWC, which would be unnecessarily time consuming.

In addition, the recommendation would not restrict the Office's access to information it uses to generally educate injured employees and death beneficiaries about the existence of the Office and its services, which it does to fulfill its statutory duty to assist them in obtaining workers' compensation benefits. Such information may include the names and contact information of employees whose injuries are reported to DWC, but would not include other information included in the claims files, such as sensitive medical claim information.

***Agency Response:*** As a result of OIEC's Legislative recommendation to the 81<sup>st</sup> Texas Legislature, House Bill (HB) 673 substantially amended §404.111 of the Texas Labor Code to reduce OIEC's access to attorney-work product and enhance both civil and criminal penalties for any employee that improperly discloses confidential claim information. This statutory change was a direct result of legislation crafted by the author of workers' compensation reform, the Workers' Compensation Commissioner, and the Public Counsel. OIEC agrees with Sunset Advisory Commission Staff that OIEC has not misused its authority. OIEC's management is sensitive to the appearance of impropriety, and as the sole advocacy agency for injured employees, OIEC understands the importance of confidential claim information.

Accessing claimant information is necessary for the agency to fulfill its cause and case advocacy roles. The agency accesses individual claimant information only after the injured employee authorizes the release of information and understands the agencies services. Aggregate information is needed to advocate on behalf of injured employees as a class. OIEC abides by restrictions pursuant



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to HB 673 and believes no further statutory changes need to be made in light of both the passage of HB 673 and the severe penalties established by Labor Code §404.111 for disclosing confidential information.

### Management Action

#### 2.2 *Direct the Office to work with DWC to complete firewalls in the new database system.*

This recommendation would direct the Office to work with DWC during its development of the new computer system to include proper firewalls restricting information. These firewalls would ensure that the Office has the appropriate access to information needed to perform its duties without receiving information that is statutorily protected.

**Agency Response:** OIEC agrees with this recommendation to work with DWC during its development of the new computer system to include proper firewalls restricting information from field office staff. OIEC's access to the current DWC information technology system has been restricted in order to avoid the appearance of impropriety. As a result of this information technology restriction, OIEC has difficulties in monitoring both agency's workload and the ability to fully prepare an injured employee prior to entering TDI-DWC's administrative dispute resolution process. OIEC looks forward to working with DWC staff on developing a database that will give the agency appropriate access and allow OIEC to capture its early intervention workload. OIEC believes this business process improvement will yield better oversight over staff, which will ensure an increased ability to protect the rights of the injured employees of Texas.

OIEC has formed a committee that is currently working with DWC staff to develop a new system to ensure appropriate access of information to OIEC staff. OIEC's management is sensitive to the appearance of impropriety and is committed to working with DWC to ensure that all system participants operate on a level playing field in the administrative dispute resolution process.

OIEC appreciates the opportunity to respond to recommendations made in the Sunset Advisory Commission Staff Report regarding changes in statute and actions that OIEC should take in response to issues identified in the report. Please do not hesitate to contact me if I can be of further assistance. Thank you.

Sincerely,



Norman Darwin

Public Counsel

Office of Injured Employee Counsel

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